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No. 790

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1967

BRASWELL MOTOR FREIGHT LINES, INC., ET AL, *Appellants*

vs.

UNITED STATES OF AMERICA, ET AL, *Appellees*

On Appeal from the United States District Court
for the Western District of Texas

Appellant's Motion for Rehearing

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Pursuant to Rule 58 of the Rules of the Supreme Court Appellant, Braswell Motor Freight Lines, Inc., files this its motion for rehearing and says:

Each of the several questions presented in the Jurisdictional Statement when refined resolve themselves into a single important question as follows:

Is the Respondent Commission required to comply with the mandatory requirements of the Administrative Procedure Act, 5 U.S.C., 1001 et seq, and in particular with Sections 8(b) and 10(e) thereof? 5 U.S.C., 1007(b) and 1009(e).

The purpose and intent of Congress in passage of the Administrative Procedure Act was clearly to confine administrative agencies, such as respondent Commission here, within fixed positive requirements as

well as limitations. *Wong Vang Sung vs. McGrath*, 339 U.S. 33, discusses rather fully the purpose and legislative history. Suffice to say here the purpose was that it act as a check upon administrators to correct abuses and to create safeguards "even narrower than constitutional one" against arbitrary encroachment upon rights. *United States vs. Morton Salt Co.*, 338 U.S. 632.

Among such safeguards are those of Sections 8(b) and 10(e), 5 U.S.C. 1007(b) and 1009(e). Each are highly pertinent and important here. Section 10(a) and (c) provides the positive remedy of judicial review.

Section 8(b) is mandatory providing that, "All decisions (including initial, recommended or tentative decisions) *shall* become a part of the record and *shall* include a statement of (1) *findings and conclusions*, as well as *the reasons or basis therefor*, upon *all* the *material issues of fact, law, or discretion* presented on the record; and (2) the appropriate rule, order, sanction, relief or denial thereof."

This language is mandatory and exacting. In this respect the Respondent — Commission's order wholly and utterly fails to comply. Under the exacting provisions of Section 8(b), quoted above the Commission has said that in a Section 5 proceeding (acquisitions) 49 U.S.C. 5, that "We must find;"

(1) "That it will be consistent with the public interest, a concept which;"

(2) "Has direct relation to adequacy of transportation service;"

(3) "To its essential conditions of economy and efficiency;"

(4) "To appropriate provision and best use of transportation facilities;"

(5) The "interest of competing carriers;" and

(6) "That of shippers and consignees."

And the Commission explained that:

(1) It "*is our duty* to consider the effect which a proposed *new unified* service will have on the continuance, efficiency and economy of existing carrier services;"

(2) "If such proposed new unified service would adversely affect to any substantial extent the continuance, efficiency and economy, to the detriment of the public;" then,

(3) "Whether it would result in offsetting advantages to the public;" and,

(4) "Whether approval or disapproval would more nearly conform with the policy of Congress declared in the national transportation policy."

Pacific Intermountain Express—Control—Keeshin, 57 M.C.C. at page 470.

The Respondent—Commission's decision is before the Court. Reported at 101 M.C.C. 1. It utterly fails to make findings and conclusions, as well as the reasons or basis therefor, upon *all* material issues" etc.

Commission made only one of the essential findings of the several which it said "We must find," which is as follows:

> "In our opinion the record here is clear that approval of the instant transaction would have a substantial adverse effect upon existing carriers operating from and to points in Arizona and California and our findings will be conditioned accordingly." (Juris.Stmt., Appendix B, page B-27).

And that finding or conclusion is not supported by substantial evidence. Fact is that that finding is directly contrary to the undisputed evidence. But see the Examiner, Report and Order, Jurisdictional Statement, Appendix C, which does comply with Section 8(b), Administrative Procedure Act, which is full and complete and does consider all of the "*Musts*" set out above.

If Section 8(b), 5 U.S.C. 1007(b), means what it says, and we do not see how it can be disputed, then the Commission's decision is void and this Court should so say.

Let us now consider Section 10(e), 5 U.S.C. 1009 (e). It too is mandatory. It is unnecessary to quote at length. But it does say the "reviewing Court' . . . *shall* . . . (B) hold *unlawful* and set aside agency action found to be unlawful and set aside action . . ." etc., then follows six specific reasons plus a requirement that "and due account *shall be taken* of the rule of prejudicial error."

The fact that the Commission wholly failed to comply with the requirements of Section 8(b) makes the Commission's decision "(1) arbitrary, capricious, an abuse of discretion" and not "in accordance with law.' Section 10(e). Also "(3) in excess of statutory jurisdiction, *authority, or limitations, or short of statutory right.*"

And harken to this 10(e), "(4) without observance of procedure required by law," for there was surely and certainly no "observance of procedure" required by Section 8(b).

Then follows the requirement that the reviewing Court "shall" . . . (B) hold unlawful and set aside agency action . . . (5) unsupported by substantial evidence, see also "(6)," Ibid.

The sole determining finding of the Commission is quoted hereinabove. It is not supported by substantial evidence. To the contrary the only reliable and the undisputed evidence is the operating reports of the carriers themselves, received in evidence, discussed by the Examiner, and collated for the Court at page 16 of the Jurisdictional Statement herein, during a competitive period of operation. See also Exhibit No. 54. These reports (from official records) show with positive certainty that contrary to the Commissions finding quoted above, that none of the existing carriers had or would suffer any "adverse effect" whatever, much less that there would be a "substantial adverse effect."

Under the facts of this case this Honorable Court has a positive duty to hold the Commission order void.

Appellant has been raising this question from the day its original petition for review was filed in the District Court of the Western District of Texas, El Paso Division but both that Court, and thus far this Honorable Court, has brushed it aside as nothing. Well that is to write the Administrative Procedure Act out of the statutes so far as Appellant is concerned. That is a positive personal wrong.

The trial court did not even mention any section of the Administrative Procedure Act as even having any bearing upon its certainly erroneous decision. It sustained respondent — appellee's decision, which under facts here present, Congress has decreed to be void. In these circumstances the obligation of this Honorable Court to safeguard the rights of Appellant as Congress intended by the Administrative Procedure Act becomes more onerous and compelling.

Surely this Honorable Court is not going to sanction such conduct of the Interstate Commerce Commission or of the Court below.

Appellant prays that this motion be granted; that the per curiam be set aside; that the order of the Commission and the decision and judgment of the Court below be set aside and the matter be remanded to the Court below or to the Commission with instructions, and will ever so earnestly pray.

Respectfully submitted,

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CERTIFICATE OF COUNSEL

I, T. S. Christopher, attorney for appellant, hereby certify that the foregoing motion is presented in good faith and not for delay; that counsel verily believes under applicable law that the motion should be granted and the cause remanded with instructions.

s/ T. S. Christopher

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PROOF OF SERVICE

I, T. S. Christopher, one of the attorneys for appellants herein, and a member of the Bar of the Supreme Court of the United States, hereby certify that on the 7th day of February, 1967, I served copies of the foregoing Reply to Motions to Dismiss and to Affirm on the several parties to this action as follows:

1. On the United States, by mailing copies thereof, in duly addressed envelopes, postage prepaid, to Hon. Erwin N. Griswold, Solicitor General, Department of Justice, Washington, D. C. 20530; to Hon. Donald F. Turner, Assistant Attorney General, Department of Justice, Washington, D. C. 20530; to Hon. Gregory B. Hovendon, Attorney, Department of Justice, Washington, D. C. 20530; and to Hon. Seymour H. Dussman, Attorney, Department of Justice, Washington, D. C. 20530.

2. On the Interstate Commerce Commission, by mailing copies thereof, in duly addressed envelopes, postage prepaid, to Hon. Robert W. Ginnane, General Counsel, Interstate Commerce Commission, Washington, D. C. 20423, and to Hon. Emmanuel H. Smith, Attorney, Interstate Commerce Commission, Washington, D. C. 20423.

3. On the Attorneys for other appellees herein, by mailing copies thereof, in duly addresed enevlopes, postage prepaid, to David Axelrod, Esq., Axelrod, Goodman & Steiner, 39 South LaSalle Street, Chicago, Illinois 60603; to Bruce Hallmark, Esq., Goodman and Hallmark, Suite 13A, El Paso National Bank Build-

ing, El Paso, Texas 79901; to Wentworth E. Griffin, Esq., Reeder, Griffin & Dysart, 812 Midland Building, 1221 Baltimore Street, Kansas City, Missouri 46105; and to Phillip Robinson, Esq., James, Robinson, Felts & Starnes, The 904 Lavaca Building, Austin, Texas 78701.

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